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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

KIRK JUILLARD GOSCH,

Defendant-Appellant.

NO. 38675

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF KOOTENAI**

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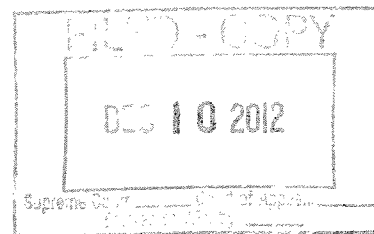


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STATEMENT OF THE CASE

Nature Of The Case

Kirk Julliard Gosch appeals from the judgment of conviction for two counts of trafficking marijuana.

Statement Of The Facts And Course Of The Proceedings

The state charged Gosch with two counts of trafficking in marijuana and a persistent violator enhancement. (R., vol. I, pp. 86-88, 123-25.) The case proceeded to jury trial, after which the jury convicted Gosch as charged on the trafficking counts. (R., vol. II, pp. 201-35, 244-62, 303-05.) Gosch thereafter entered a guilty plea to the enhancement. (Trial Tr., p. 351, L. 14 – p. 353, L. 1.) The district court entered judgment, sentencing Gosch to concurrent terms of 16 years with six years fixed on each count. (R., vol. II, pp. 317-19.) Gosch filed a timely appeal from the judgment. (R., vol. II, pp. 331-35.) He also filed a Rule 35 motion, which the district court denied. (R, vol. II, pp. 340-41; 2/14/12 Order (augmented July 31, 2012).)

ISSUES

Gosch states the issues on appeal as:

1. Was the evidence sufficient to support a finding of guilt on count one?
2. Did the district court err when it prevented Mr. Gosch from cross-examining a witness about details of the underlying investigation?
3. Did the district court abuse its discretion when it imposed concurrent unified sentences of sixteen years, with six years fixed, following Mr. Gosch's convictions on two counts of trafficking in marijuana?
4. Did the district court abuse its discretion when it denied Mr. Gosch's Rule 35 motion in light of the new information provided in support thereof?

(Appellant's brief, p. 6.)

The state rephrases the issues as:

1. There was overwhelming evidence that it was Gosch who possessed and then delivered the marijuana at issue to the confidential informant. Has Gosch failed to show that the testimony of multiple witnesses as well as overwhelming circumstantial evidence was insufficient to support the jury's verdict?
2. Has Gosch failed to show that evidence that there was no marijuana at his parents' house was relevant to show that he did not deliver the marijuana to the informant or possess the marijuana in the car he drove?
3. Given his extensive criminal record, has Gosch failed to show an abuse of discretion in the concurrent sentences of 16 years with six years fixed on two counts of trafficking in marijuana as enhanced for being a persistent violator?
4. Has Gosch failed to show that the district court was required to reduce his sentence because he presented information that he could get into a treatment program if he was granted probation?

ARGUMENT

I.

Gosch Has Failed To Show The Evidence Supporting The Jury's Guilty Verdict On Count I Is In Any Way Deficient

A. Introduction

In Count I, trafficking in marijuana, the state charged that Gosch “did possess and/or deliver” what he represented was “one (1) pound or more of Marijuana.” (R., vol. I, p. 124.) Gosch claims the evidence supporting the conviction on this count was insufficient because no eye witness identified him as the one who delivered the marijuana to the confidential informant and no fingerprint evidence linked him to the marijuana delivered. (Appellant’s brief, pp. 8-9.) This argument fails because there was more than sufficient evidence linking Gosch to the marijuana possession and delivery charged in Count I.

B. Standard Of Review

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Sheahan, 139 Idaho 267, 285-86, 77 P.3d 956, 974-75 (2003); State v. Curry, 153 Idaho 394, ___, 283 P.3d 141, 143 (Ct. App. 2012). The evidence is sufficient where there is substantial, even if conflicting, evidence from which a reasonable juror could find all the elements of the crime proven beyond a reasonable doubt. State v. Thomas, 133 Idaho 172, 174, 983 P.2d 245, 247 (Ct. App. 1999). The evidence is considered “in the light most favorable to the prosecution.” Curry, 153 Idaho at ___, 283 P.3d at 143-44.

C. The Evidence That It Was Gosch Who Possessed And Delivered The Marijuana To The Confidential Informant As Charged In Count I Is Overwhelming

The evidence demonstrated the following facts. An informant working with police arranged to purchase a pound of marijuana from Gosch in a recorded telephone conversation. (Trial Tr., p. 170, L. 12 – p. 172, L. 8; p. 196, L. 19 – p. 202, L. 1; Plaintiff's Exhibit 1.) Gosch arrived at the time and place arranged for the marijuana purchase with his girlfriend in his girlfriend's car. (Trial Tr., p. 100, L. 7 – p. 101, L. 1; p. 121, Ls. 9-17; p. 158, L. 7 – p. 159, L. 12; p. 159, L. 19 – p. 164, L. 18; Plaintiff's Exhibits 16A, 16B, 16J.) While his girlfriend remained in the car, Gosch exited and contacted the informant. (Trial Tr., p. 164, L. 15 – p. 166, L. 4.) Thereafter Gosch retrieved a bag from the trunk of his girlfriend's car, which matched the bag containing the marijuana received by the informant, and threw it into the informant's car. (Trial Tr., p. 167, L. 11 – p. 168, L. 9; p. 203, Ls. 4-14; p. 208, L. 22 – p. 209, L. 24; p. 228, L. 5 – p. 232, L. 2.) The informant then handed Gosch money. (Trial Tr., p. 168, L. 16 – p. 169, L. 13.) Gosch counted the money, and determined it was "short." (Trial Tr., p. 169, Ls. 14-22.) He then confronted the informant about the short. (Trial Tr., p. 169, L. 20 – p. 170, L. 11.) The police recorded the transaction when Gosch sold the marijuana to the informant, including the conversation between the informant and Gosch about the "short." (Trial Tr., p. 201, L. 7 – p. 202, L. 24; p. 204, L. 7 – p. 206, L. 8; p. 172, L. 9 – p. 173, L. 7; Plaintiff's Exhibit 2.) The next day a search of Gosch's wallet revealed \$365 of the marked money used by the informant to buy

the marijuana. (Trial Tr., p. 97, L. 13 – p. 98, L. 24; p. 102, L. 17 – p. 105, L. 16; p. 106, Ls. 21-24; Plaintiff's Exhibit 12.)

On appeal Gosch argues that the evidence he delivered or possessed marijuana as alleged in Count I is insufficient because of “the lack of any testimony establishing that the bag of marijuana provided by the informant was the same package delivered by Mr. Gosch, the lack of fingerprints on the bag, and the failure to locate more than fifteen percent of the buy money [in Gosch's wallet].” (Appellant's brief, p. 10.) This argument is specious.

Gosch arranged to sell a pound of marijuana to an informant and delivered a package to the informant in exchange for over \$3,000 according to the terms he arranged. The informant turned over a package of marijuana that appeared to be the same package Gosch delivered. Because the inference that it was the same package is reasonable, to accept Gosch's argument that the evidence was insufficient to support the conclusion he possessed and then delivered the package in which police ultimately recovered the marijuana would require this Court to abandon the applicable legal standard of deferring to reasonable inferences drawn by the jury. State v. Adamcik, 152 Idaho 445, 460, 272 P.3d 417, 432 (2012) (“the Court is required to consider the evidence in the light most favorable to the State, and we do not substitute our judgment for that of the jury on issues of ... reasonable inferences to be drawn from the evidence”); Curry, 153 Idaho at ___, 283 P.3d at 143 (“We do not substitute our view for that of the jury as to ... the reasonable inferences to be drawn from the evidence.”).

Because the evidence supporting the verdict in Count I is overwhelming, Gosch has failed to show error.

II.

Gosch Has Failed To Show That Evidence Regarding The Execution Of A Search Warrant At Gosch's Parents' House Was Relevant To This Case

A. Introduction

During cross examination of one of the officers at trial, Gosch's counsel asked about a search warrant executed at Gosch's parents' house. (Trial Tr., p. 218, L. 16 – p. 220, L. 4.) When counsel asked how many officers were involved in the search, the prosecutor objected on the basis that he did not “think the search warrant executed on his parents' house has anything to do with this.” (Tr., p. 220, Ls. 5-9.) When the court asked defense counsel what the relevance was, counsel responded, “That they went in there and found nothing.” (Trial Tr., p. 220, Ls. 10-12.) The court then sustained the objection. (Trial Tr., p. 220, L. 13.)

On appeal Gosch argues that “evidence that no ‘stash’ of marijuana was found at Mr. Gosch's parents' house, despite a magistrate having probable cause to issue a warrant to search their home, was relevant in that it tended to make it somewhat less likely that Mr. Gosch was the person responsible for the delivery of marijuana to the informant and responsible for trafficking in marijuana by possessing the marijuana found in [the car that Gosch normally drove].” (Appellant's brief, p. 12.) This argument, like the last, is meritless. The evidence was not relevant and, even if it was, any error was plainly harmless.

B. Standard Of Review

Relevance of evidence is reviewed de novo. State v. Gomez, 137 Idaho 671, 674, 52 P.3d 315, 318 (2002); State v. Reid, 151 Idaho 80, 86, 253 P.3d 754, 760 (Ct. App. 2011).

C. Evidence There Was No Marijuana At Gosch's Parents' Home Was Not Relevant To This Case

To be admissible, evidence must be relevant. I.R.E. 401, 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401; State v. Hocker, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989). Evidence there was no marijuana at his parents' house did not make it any less likely that Gosch possessed the marijuana in the car he drove, or less likely that he delivered marijuana to the confidential informant.

In addition, any error in excluding the evidence was harmless because even if the evidence could be said to have probative value, that value is so slight that the evidence would not have changed the outcome of the trial. I.R.E. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected"); State v. Johnson, 148 Idaho 664, 669, 227 P.3d 918, 923 (2010) (error in exclusion of evidence is harmless if, beyond a reasonable doubt, the jury would have convicted had the evidence been admitted). Even if evidence of all the places Gosch did not hide

marijuana was somehow relevant, exclusion of evidence that no marijuana was in his parents' house in no way prejudiced Gosch.

III.

Gosch Has Not Shown That The District Court Abused Its Sentencing Discretion

A. Introduction

The district court imposed concurrent sentences of 16 years with six years fixed on two counts of trafficking in marijuana with a persistent violator enhancement. (R., vol. II, pp. 317-19.) Gosch asserts the court abused its sentencing discretion. (Appellant's brief, pp. 13-15.) Application of the correct legal standards to the facts of this case shows no abuse of sentencing discretion.

B. Standard Of Review

Sentencing is an exercise of discretion. State v. Charboneau, 124 Idaho 497, 499, 861 P.2d 67, 69 (1993). "Where reasonable minds might differ, the discretion vested in the trial court will be respected, and [the appellate court] will not supplant the views of the trial court with its own." State v. Nienburg, 153 Idaho 491, ___, 283 P.3d 808, 815 (Ct. App. 2012).

C. The Sentences Are Well Within The District Court's Discretion Under The Facts Of This Case

The legal standard applicable to Gosch's claim is well established:

In order to prevail, the appellant must establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing.

Nienburg, 153 Idaho at ____, 283 P.3d at 815. Of these objectives, protection of society is “primary.” State v. McGiboney, 152 Idaho 769, 773, 274 P.3d 1284, 1288 (Ct. App. 2012) (citing State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982)).

The district court considered the four objectives of sentencing and concluded, “This is a protection of the public case.” (Trial Tr., p. 370, Ls. 11-20.) Significant to the sentencing court were Gosch’s criminal record, that Gosch had been placed on probation in 2005 and yet committed the instant offenses, and that he had a good family. (Trial Tr., p. 369, L. 23 – p. 370, L. 10.) The record supports this analysis.

Gosch was convicted of his first felony (a felony theft offense) in Arizona in 2000. (PSI, p. 3.) He was later convicted of three drug-related felonies in Idaho and placed on probation. (PSI, p. 4.) He very quickly violated that probation and the court order the sentences executed. (PSI, pp. 4, 6.) He was released on parole, but again almost immediately violated its conditions and went back to prison. (PSI, p. 6.) He had been given another opportunity for parole, but violated it when he committed the instant felonies. (Id.)

Gosch cites his claims of remorse, the fact he is an alcoholic and drug addict, his family support, and his “many years of work as a drywall installer” as mitigating.¹ (Appellant’s brief, pp. 13-15.) Even considering these factors, however, no abuse of discretion has been shown.

¹ Several of the years Gosch claimed he was employed installing drywall were in fact spent in prison. (Compare PSI, pp. 3-6 with PSI, p. 10.)

This case represents Gosch's fifth and sixth felony convictions. He has previously violated probation or parole on at least three occasions, and committed the instant offenses while on parole. The crimes at issue are two counts of trafficking, which carry mandatory minimum sentences of one year each, I.C. § 37-2732B(a)(1)(A), and with the persistent violator enhancement the sentences could have ranged up to fixed life, I.C. § 19-2514. The relatively short fixed time of six years will give Gosch meaningful opportunity for parole, while the lengthier ten year indeterminate time will allow ample opportunity for rehabilitation if he secures release through sufficiently good behavior. Gosch has failed to show the sentence unreasonable, and has therefore failed to show an abuse of discretion.

IV.

Gosch Has Failed To Show Error In The Denial Of His Rule 35 Motion

If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and the Court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Gosch must "show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id.

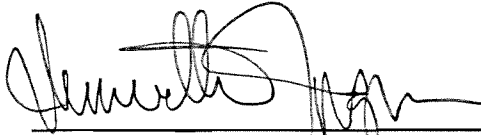
The new information Gosch submitted in support of his motion to reduce the sentence was evidence about a drug counseling program, "Mountain of Mercy," that was available to him. (Rule 35 Tr., p. 5, L. 9 – p. 8, L. 2.) The trial court concluded the sentences were reasonable, and that Gosch could include

the Mountain of Mercy counseling program in his parole plan. (Rule 35 Tr., p. 9, L. 14 – p. 10, L. 3.) Gosch has failed to show an abuse of discretion.

CONCLUSION

The state respectfully requests this Court to affirm the district court's judgment and order denying Rule 35 relief.

DATED this 10th day of December, 2012.

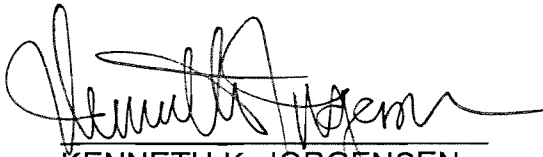

KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 10th day of December 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SPENCER J. HAHN
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.


KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm